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Consolidated Cases: 00-14763-I, 00-15068-D, & 01-13058-B
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALABAMA POWER COMPANY and GULF POWER COMPANY,	)	
Petitioners,	)	
v.	)	**Consolidated Cases: 00-14763-I, 00-15068-D, & 01-13058-B**
FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES,	)	
Respondents.	)	

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

SUPPLEMENTAL REPLY BRIEF OF ALABAMA POWER COMPANY AND GULF POWER COMPANY (IN RESPONSE TO MAY 25, 2001, FCC ORDER)

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Dated: August 6, 2001

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE and Eleventh Circuit Rule 26.1-1, it is hereby certified that the following persons or governmental agencies have been associated with or have an interest in the outcome of this case:

Adelphia (party to Docket No. PA-00-003 before the Federal Communications Commission)

Alabama Cable Telecommunications Association (party to Docket No. PA-00-003 before the Federal Communications Commission)

AT&T Cable Services (party to Docket No. PA-00-003 before the Federal Communications Commission)

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D. H. Ward, III, Representative for Sky Cablevision, Ltd. (party to Docket No. PA-00-003 before the Federal Communications Commission)

It also is certified that the following corporations have an interest in the outcome of this case:

Alabama Power Company (Petitioner)

Empresa Eléctrica del Norte Grande, S.A. (Edelnor) (affiliate of Petitioners)

Georgia Power Company (affiliate of Petitioners)

Gulf Power Company (Petitioner)

Hidroeléctrica Alicura, S.A. (affiliate of Petitioners)

Integrated Communication Systems, Inc. (affiliate of Petitioners)

Mississippi Power Company (affiliate of Petitioners)

Mobile Energy Services Company, L.L.C. (affiliate of Petitioners)

Savannah Electric and Power Company (affiliate of Petitioners)

Southern Communications Systems (affiliate of Petitioners)

Southern Company Capital Trust I (affiliate of Petitioners)

Southern Company Capital Trust II (affiliate of Petitioners)

Southern Company Services, Inc. (affiliate of Petitioners)

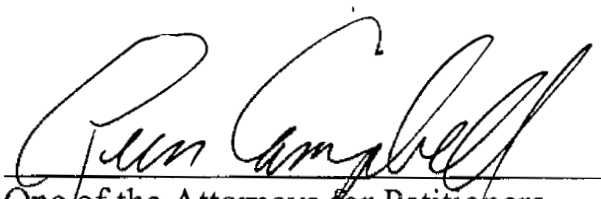
Southern Electric Generating Company (affiliate of Petitioners)

Southern Electric International (affiliate of Petitioners)

Southern Investment Group (affiliate of Petitioners)

Southern Nuclear Operating Company, Inc. (affiliate of Petitioners)

Southern Power Company (affiliate of Petitioners)



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ARGUMENT

The supplemental briefs submitted by the FCC and the Cable Companies make clear that the May 25 Order does nothing to cure the constitutional infirmities of the Cable Rate. Neither brief raises new arguments nor offers any reasoned analysis for the FCC's rejection of fundamental constitutional principles of just compensation. Far from curing any constitutional problems, the May 25 Order confirms the need for this Court to end the FCC's blind adherence to the Cable Rate.

I. THE DISPARITY BETWEEN THE CABLE RATE AND TELECOM RATE DEMONSTRATES THAT THE CABLE RATE IS CONSTITUTIONALLY INSUFFICIENT.

If a cable company demands access to APCo's poles, the Cable Rate would allow APCo to charge an annual rate of $6.30 per pole.[1] Cable attachments occupy a presumptive one-foot space on APCo's poles and are not charged a full allocation for unusable space. If a telecommunications company attaches, the Telecom Rate

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[1] Consistent with Petitioners' previous briefs, any reference to APCo also applies to Gulf Power. The FCC's continued insistence that Gulf Power be dismissed from this appeal is an attempt to distract attention from the substantive issues. All three Petitions concern the exact same question of law and all three may be resolved on the exact same facts. Gulf Power is aggrieved by both FCC Orders. Gulf Power's Response to Motion to Dismiss (No.00-15068-D) at 2-8. Even cable companies believe that at least the September 8 Order is binding against Gulf Power. *See, e.g., id.* at 2 & Exhibit 2 (letter relying on September 8 Order for refusal to pay Gulf Power's just compensation price).

would allow APCo to charge an annual rate of $20.41 per pole.[2] The telecommunications attachment also occupies a presumptive one-foot space on APCo's poles. However, the telecommunications attacher pays a full allocation for unusable space which Congress recognized is of "equal benefit to all entities attaching to the pole." H.R. Rep. No. 104-204, 92, 1996 U.S.C.C.A.N., at 58-59; H.R. Con. Rep. No. 104-458, 206, 1996 U.S.C.C.A.N., at 220. From APCo's perspective, the cable and telecommunications physical attachments are virtually identical. Yet, there is a 300% disparity (due to the unusable space allocation).

Neither the FCC nor the Cable Companies can offer a straight-face explanation for the disparity between the Cable Rate and the Telecom Rate. The FCC argues: "the Congressional decision to create a potentially higher telecommunications rate is constitutionally irrelevant." FCC Brief at 9.[3] The Cable Companies add: "The fact that Congress established a different cost reimbursement formula for providers of telecommunications services is entirely irrelevant." Cable Companies Brief at 14. The FCC and the Cable Companies offer nothing more than these unsupported, unexplained, dismissive statements to support the 300% disparity.

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[2] This is the fully phased-in Telecom Rate. *See* Petitioners' Brief at p. 23 n. 16.

[3] Citations to "FCC Brief" or "Cable Companies Brief" refer to the Supplemental Response Briefs submitted by the FCC and Cable Companies.

The error of the "constitutionally irrelevant" argument is compounded by proclaiming that the Telecom Rate **over**-compensates utilities. The FCC reasons: "The Constitution does not forbid a range of permissible rates and places no restrictions on a Congressional balancing of interests so long as the resulting rates are above the minimum level." FCC Brief at 9. The Cable Companies add: "if anything, the [Telecom Rate] may provide *excess* compensation to the utilities." Cable Companies Brief at 14 (emphasis in original). Neither statement is supported by legal authority or legislative history.[4]

APCo already has demonstrated that the Constitution does not allow for a balancing of interests or favorable treatment on the basis of policy or political motives in arriving at a measure of just compensation. Petitioners' Brief at 18-23; Reply Brief at 6-18; Supplemental Brief at 4-9. To accept the "over-compensation" arguments would require a finding that Congress determined that the Cable Rate afforded utilities just compensation for the taking of one-foot of pole space, but that for some reason telecommunications providers were required to pay more than 300% of "just compensation" for the same pole space. Not only does this argument defy

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[4] The FCC argues that because APCo recovers make-ready costs, if it collects 1¢ from cable companies it is already over compensated. APCo has previously addressed this argument in previous filings. *See* Petitioners' Initial Reply at 12-15; APCo's Reply to Opposition to Motion For Stay Pending Review at 10 n.9 (discussing treatment of make-ready charges as Contributions in Aid of Contruction).

common-sense, but it also contradicts arguments advanced by the FCC and Cable Companies since 1996. Beginning with *Gulf Power I*, the FCC and Cable Companies have argued that the entire pole attachment regulatory scheme was designed to prohibit utilities from seeking "monopoly" or "hold-up profits." The same arguments have been advanced in this case. *See, e.g.*, FCC Initial Response Brief at 4 & 25; Cable Companies' Initial Response Brief at 11-12. If APCo's one-foot of pole space is worth only $6.30 (the Cable Rate), Congress never would have allowed APCo to charge a telecommunications company $20.41. The disparity is not a congressionally sanctioned "windfall" to APCo; it is proof positive that the Cable Rate does not afford APCo the "full and perfect price" for the taking of its private property.[5] Two different prices for the same property is counter-intuitive, defies economic principles and therefore the constitutional mandate of just compensation.[6]

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[5] The Cable Companies make much of the fact that as the number of attaching entities increase, the Telecom Rate (and therefore the disparity between it and the Cable Rate) will decrease. While their math is correct, just compensation is measured at the time of the taking and does not take into consideration future market conditions. *Olson v. United States*, 292 U.S. 246, 255 (1934); Petitioners' Brief at 23 n. 16. Applying APCo's current cost data, there is a 300% disparity. The disparity exists because cable companies are not required to pay a full allocation for unusable space. No math based on future possibilities can remedy that flaw. APCo fully addressed this argument in its Initial Reply Brief (at 10-12).

[6] The economic principle known as the Law of One Price states: "in the same open market at any moment, there cannot be two prices for the same kind of article." The Penguin Dictionary of Economics (R.E. Baxter & Evan Davis, 1998).

II. THE CABLE COMPANIES MISCHARACTERIZE *GULF POWER I.*

The Cable Companies make the argument that this Court, in *Gulf Power I*, "rebuffed" the distinction between rate regulation and just compensation. Cable Companies Brief at 5. They also claim that this Court "observed that § 224 appeared to be not only sufficient, but quite capable of providing a rate in excess of what the utilities were constitutionally due." Cable Companies Brief at 6. Both claims are complete mischaracterizations of the Court's holding in *Gulf Power I.* The Court made clear its choice to leave the just compensation analysis for another day: "we decide **nothing** about the relationship between the 'just and reasonable' rate specified in the Act and just compensation required by the Constitution, because that issue is not ripe for decision." *Gulf Power I*, 187 F.3d 1324, 1338 (11th Cir. 1999) (emphasis added).

III. MANDATORY ACCESS RESULTS IN A LOSS TO APCO.

In a prototypical bootstrap, the FCC and Cable Companies argue that but for mandatory access, APCo would be entitled to nothing more than the Cable Rate and therefore the Cable Rate must equal just compensation. FCC Brief at 6-7; Cable Companies Brief at 9. There are several problems with this argument.

In the just compensation context, this means that whenever the input into the equation is the same, the output should be the same. Here, the "input" is one-foot of pole space. The price should not change based upon the business of the takers.

First, the argument relies on the assumption that just compensation for a taking of private property means something different in a regulated industry than it means in an unregulated industry. However, everyone agrees that just compensation is a constitutional question. Constitutional adequacy is not a function of whether or not an industry has been historically regulated, much as due process is not a function of an individual's criminal history.

Second, the argument completely ignores the Telecom Rate. Without mandatory access, APCo - at a bare minimum - would be able to exclude cable attachments and rent space only to telecommunications entities at the 300% higher Telecom Rate.[7]

Third, the reference to the old regulatory rate regime clouds the inquiry. Now that APCo's property has been taken, the question should be: what is the appropriate level of compensation? The starting point in any just compensation analysis is fair market value - i.e., what a willing buyer and willing seller would agree upon. Because fair market value is difficult to determine considering the historical regulation, the substitute should be a recognized and accepted fair market value proxy

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[7] The Telecom Rate is not without its own flaws. However, because it at least accounts for an equal share of unusable space, the flaws are not as glaring.

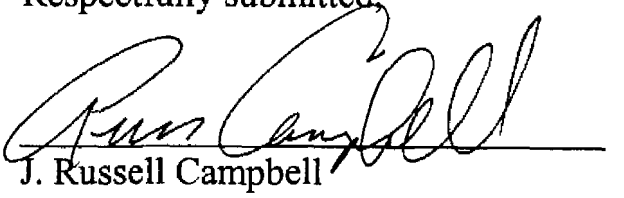
(such as replacement cost) - not, as the FCC and Cable Companies argue, a default to the old regulatory regime.

IV. THE MAY 25 ORDER OF THE FULL COMMISSION, LIKE THE SEPTEMBER 8 CABLE BUREAU ORDER, IS NOT THE PRODUCT OF REASONED DECISION MAKING.

Both the September 8 and May 25 Orders merely made conclusory statements as to why the FCC chose to reject APCo's arguments. In an effort to justify the dearth of explanation supporting these conclusions, the FCC states: "it is clear that the Cable Rate formula satisfies the constitutional minimum." FCC at 9-10.

APCo set forth characteristic examples of the FCC's unsupported conclusions in its Supplemental Brief. *See* Petitioners' Supplemental Brief at 12-13. The FCC's multiple assertions that APCo presented "no evidence" and "no credible evidence" ignore the volumes of evidence APCo submitted and that are before this Court in the record on review. Conclusory rejections of this evidence are not sufficient. An agency abuses its discretion "if it fails to state its reasons and show proper consideration of all factors when weighting equities and denying relief." *Georgia v. INS*, 90 F.3d 374, 376 (9th Cir. 1996); *Mattis v. INS*, 774 F.2d 965, 967 (9th Cir. 1985) ("Cursory, summary or conclusory statements are inadequate."). The FCC Orders do not meet this threshhold.

Respectfully submitted,



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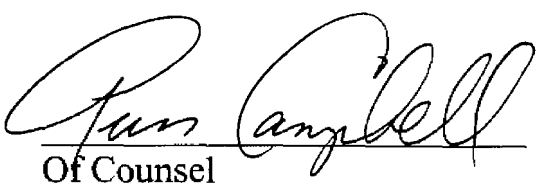

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